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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT E. BADHAM, *et al.*,
Petitioners

v.

THE SECRETARY OF STATE OF THE STATE OF CALIFORNIA, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS TO BRIEFS IN OPPOSITION OF ASSEMBLY OF STATE OF CALIFORNIA AND CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION

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INTRODUCTION

The result of more than two years of abstention is that citizens in the nation's largest state have been, and continue to be, deprived of the fundamental right to effective representation in Congress by a sophisticated gerrymander that discriminates against Republican voters and candidates. The respondents that have filed briefs in opposition are the primary beneficiaries (the California Democratic Congressional Delegation) and architects (the California Assembly) of this gerrymander. They argue that certiorari should be denied because there is no conflict of authorities in the lower courts. They neglect to acknowledge in respect of this argument a concession that the Congressional respondents made in a brief amicus curiae filed just three days before they filed their brief in opposition here. In the amicus brief the delegation contrasted

the three-judge court's decision in *Davis* v. *Bandemer*, No. 84-1244, *appeal pending*, with the decision in this case in that the court in *Davis* did *not* abstain from deciding the federal constitutional issue presented by a political gerrymander. The decision below conflicts not only with *Davis*, as the Congressmen have now confirmed, but also with decisions of other courts of appeals. None of the respondents' arguments has merit.

Respondents seek to minimize the importance of this case by suggesting that petitioners' claim is not a substantial *federal* claim. On the contrary, fundamental federal rights are involved in this case, and a facial review of the relevant facts reveals that these fundamental rights are being violated. Clearly, something is amiss in California, and there is ample evidence that a federal judicial inquiry is not only appropriate, but necessary.

ARGUMENT

I. AN AMICUS BRIEF FILED BY ONE OF THE RESPONDENTS IN ANOTHER CASE PENDING IN THIS COURT CONCEDES THE EXISTENCE OF A CONFLICT

On March 4, 1985, three days before filing their brief in opposition here, Congressional respondents lodged a brief amicus curiae in *Davis* v. *Bandemer*, No. 84-1244, which is pending on appeal to this Court from a judgment of a three-judge district court in the Southern District of Indiana invalidating a political gerrymander—by Republicans—of the Indiana legislature. The amicus suggests that this Court should vacate the judgment in the *Davis* case and direct the district court on remand to abstain, under *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1964), from decision until state constitutional issues pertaining to the gerrymander are decided. Calif. Cong. Del. Br. Amicus Curiae, No. 84-1244, at 10-12.

The brief in opposition in this case of Congressional respondents, nevertheless, makes the disingenuous assertion that there is no conflict on the abstention issue

among the lower courts. The very opposite assertion is found in their brief amicus curiae in *Davis* v. *Bandemer*, No. 84-1244, *appeal pending*, at 10-12. In urging vacation and remand, the Congressional respondents assert that the *Davis* court improperly failed to abstain from deciding the legality of a partisan gerrymander under the federal constitution when allegedly substantial claims under the Indiana Constitution were available. They cite the court of appeals' affirmance of the district court's abstention orders in this case "[i]n similar circumstances" as an example of what a court should do. Indeed, they go as far as to say, by way of assimilating the abstention issues in the two cases, that the Indiana state constitutional claim in *Davis* "mirrors" one of the state claims in this case. *Id.* at 11.

The conflict with the Indiana decision was pointed out by petitioners in their petition. Cert. Pet. at 6, 14-17. Congressional respondents have now confirmed it in their amicus presentation in the conflicting case while, as parties to this case, denying that there is any conflict of authority on the abstention issue. Cong. Opp. at 10; *see also* Assem .Opp. at 7, 11-17. The respondents cannot have it both ways. Congressional respondents are right in asserting that the court in *Davis* did decline to abstain despite the existence of state law issues. It thereby acted consistently with every other federal court in every Congressional redistricting case save this one in recognizing its duty to decide the federal questions presented, without deferring to state court proceedings of interminable length and uncertain impact. The decision in *Davis* and the decision in this case are in direct, contemporaneous conflict.

II. THE DECISION BELOW IS IN CONFLICT WITH THOSE OF OTHER CIRCUITS

The respondents fail in their efforts to show the absence of a conflict with the decisions in *414 Theater Corp.* v. *Murphy*, 499 F.2d 1155 (2d Cir. 1974), and *Lister* v. *Lucey*, 575 F.2d 1325 (7th Cir. 1978). Their principal

effort to distinguish *414 Theater Corp.* and *Lister* is on the mistaken basis that those circuits "essentially held that abstention had not been proper in the first place." Cong. Opp. at 25, n.9. Respondents' reading of these cases is erroneous. The plain meaning of both *Lister* and *414 Theater Corp.* is that abstention must not continue indefinitely after the state courts have refused an opportunity to decide the state law issues which prompted abstention in the first instance. This is because the state court's refusal to act, even though it knew the federal court was waiting, overcomes any comity considerations. *Lister* at 1332. As stated by the Second Circuit: "Neither comity nor sound judicial administration require the abstaining court to wait indefinitely for state courts to determine the merits. *See NAACP* v. *Gallion*, 368 U.S. 16 (1961)." *414 Theater Corp.* at 1157.

Neither respondent cites any case in which a federal court has continued to abstain from consideration of a claim where a state supreme court has rejected an opportunity to rule on state issues which gave rise to abstention. Absent such authority, respondents are reduced to arguing that petitioners' petition to the California Supreme Court should be ignored as "a hopeless feint at seeking state court adjudication." Cong. Opp. at 10. But, as the petition for certiorari shows, the Supreme Court of California has regularly, and without exception for more than twenty years, exercised original jurisdiction in all other statewide reapportionment cases to render speedy and final decisions. *See* Cert. Pet. and cases referenced therein at 13.

The Congressional respondents argue in this Court that the petitioners' effort to resolve state issues by filing a petition for original writ in the California Supreme Court was not a good faith effort to secure a decision. In the Ninth Circuit, however, when they were arguing in support of the original abstention order, the respondents urged that the California Supreme Court would respond

promptly if petitioners sought an original writ and that the federal courts should defer for that very reason: the prospect of a speedy resolution of state law issues in the state's highest court. They said then:

> ". . . the Republicans could speedily resolve all the state law questions in the California Supreme Court. That resolution would be authoritative and not subject to appeal. The Republicans need merely file an original petition for an extraordinary writ, a procedure of which they are manifestly aware, . . . and which the Congressmen and the Assembly have suggested to them, both in briefs and informally . . . . The California Supreme Court can move with impressive speed in writ matters, and it has a history of rapid disposition of cases dealing with impending elections . . . . Such original writs have become the customary vehicle for resolving California's reapportionment disputes." Congressional Memorandum in Support of Answer to Petition for Mandamus in Court of Appeals for the Ninth Circuit, July 18, 1983, at 33-35.[1]

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[1] There is no merit whatever in respondents' claim in this Court that petitioners must shoulder the blame for the refusal of the California Supreme Court to act. Three assertions, all mistaken, are said to support that contention: 1) that petitioners filed too late to have the state law issues resolved by December 15, 1983: 2) that petitioners wrongfully "insisted" that the state court rule within 30 days; and 3) that the state law issues were too "complex" to be decided expeditiously.

In fact, the mandate petition was filed four days after the Ninth Circuit affirmed the initial abstention order and 75 days before December 15, 1983, the date by which the Secretary of State had said the congressional district lines had to be in place for the 1984 election. *Cf. Legislature* v. *Reinecke*, 6 Cal. 3d 595, 492 P.2d 385 (1972) (Court ruled within 34 days of mandate petition). However, even the Secretary's December 15 date was *not* an immutable deadline. Such deadlines can be, and have been, set back by the court in order to give the court time to rule. *Cf. Assembly* v. *Deukmejian*, 30 Cal. 3d 638, 639 P.2d 939 (1982) (Court set back deadline by not ruling until January 28). It is also untrue that petitioners "in-

Respondents are also wide of the mark in their claim that the decision below to abstain can be squared with the decisions of other federal courts which reviewed congressional redistricting cases after the 1980 census. *See* Cong. Opp. at 14; Assem. Opp. at 15, 16. To this end, respondents cite a string of state and local redistricting cases that, if anything, support petitioners' argument.[2]

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sisted" that the California Supreme Court decide the case in 30 days. Cong. Opp. at 22. Petitioners suggested that the court rule within approximately 30 days, or within such greater time as the court's calendar would allow. Furthermore, the claim that the issues were too complex for the State Supreme Court to decide expeditiously, Cong. Opp. at 22, is directly at odds with the arguments respondents made in 1983 urging the Ninth Circuit to abstain in favor of the California Supreme Court. The argument is also impeached by the characterization Congressional respondents attached to those issues in their own brief to the California Supreme Court in response to the petition for a writ of mandate in October, 1983. In that brief, the issues that are now called "complex" were described as "bizarre and frivolous" (p. 4), "dubious" (p. 7), not meriting "perfunctory mention" (p. 11), and "purely frivolous" (p. 12). Memorandum of California Congressional Delegation re: Issuance of Alternative Writ of Mandate, Oct. 11, 1983, at the pages cited.

[2] *Cline* v. *Robb*, 548 F. Supp. 128 (E.D.Va. 1982) (Court decided federal equal protection claim on the merits and only refrained from deciding a pendent state law claim); *Bryant* v. *Whitcomb*, 419 F. Supp. 1290 (S.D.Ind. 1970) (Court concluded that a city-county redistricting statute was unconstitutional, and declined only to rule on the validity of a severability clause); *Grivetti* v. *Illinois State Electoral Board*, 335 F. Supp. 779 (N.D. Ill. 1971) (Court found a legislative redistricting plan to be constitutional); *Baker* v. *Carr*, 247 F. Supp. 629 (M.D.Tenn. 1965) (Court discussed abstention but ruled on the merits). In the other cases cited by respondents, where federal courts did abstain, the challenged redistricting statutes did not involve congressional districts. *See Dodd* v. *Barnes*, 279 F. Supp. 291 (E.D.Tenn. 1967) (County Board of School Commissioners); *Ince* v. *Rockefeller*, 290 F. Supp. 878 (S.D.N.Y. 1968) (State Assembly Districts); *Woodard* v. *Carteret County*, 252 F. Supp. 268 (E.D.N.C. 1966) (County Commissioners).

III. THE DECISION BELOW IS WRONG

Assembly respondents suggest, without supporting authority or discussion, that the "district court did not abuse its discretion." Assem. Opp. at 17. This case does not, however, involve a mere matter of judicial discretion. The issue is one of law. A vital principle is at stake. The issue is the duty of the federal judiciary when a serious constitutional challenge is raised to a congressional redistricting to rule upon it.[3]

The court below was not presented with mere allegations of wrongdoing. It refused to reassert jurisdiction notwithstanding substantial evidence that the voting rights of millions of Californians were jeopardized by a blatant partisan gerrymander. Contrary to respondents' suggestions, the record below documents the gerrymander with an extensive compilation of expert testimony, depositions, political and statistical analysis, and cartographic exhibits, which made clear the gravity of petitioners' claim that their fundamental rights were being violated. Nevertheless, the district court was not moved.

The conflict between the decision below and *Davis* v. *Bandemer*, *supra*, is over fundamental rights and involves fundamentally different views of the duty of the federal judiciary when serious constitutional issues arise; such issues plainly exist in this case. *Cf. Zwickler* v. *Koota*, 389 U.S. 241, 248, 252-254 (1967); *Griffin* v. *School Board*, 377 U.S. 218, 229 (1964). Perhaps in the sum-

[3] Historically, this Court has always applied a more stringent constitutional analysis to congressional districting cases; i.e., that of Article I, § 2, of the Constitution. *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969); *Karcher* v. *Daggett*, 103 S.Ct. 2653 (1983). Nor is this the only federal constitutional provision applicable to congressional redistricting. *See* Article I, § 2(3); Article I, § 4; and Amendment XIV, § 2. Congress itself has imposed additional constraints on congressional redistricting. *See* 2 U.S.C. §§ 2a-9.

mer of 1983—when respondents were arguing that an expeditious proceeding could be had in the State Supreme Court—there was an arguable basis for thinking that a federal court might have the discretion to wait the three months to learn how pendent state issues would be resolved. The passage of three months at that time would not have caused the 1984 Congressional election to be held in the gerrymandered districts.[4] Once the California Supreme Court refused to act, however, no legal basis for continued abstention remained. *Lucas* v. *44th Colorado General Assembly*, 377 U.S. 713 (1964); *Ryan* v. *State Board of Elections of Illinois*, 661 F.2d 1130 (7th Cir. 1981).[5]

IV. ACTION BY THE STATE COURT WILL NOT MOOT THE UNDERLYING FEDERAL CLAIM OF GERRYMANDERING

Respondents suggest that the setting of a trial date in the state trial court—upon petitioners' motion—renders this action potentially moot. Cong. Opp. at 25; Assem. Opp. at 6. This suggestion begs the question of whether continuing abstention was proper after the California Supreme Court refused to rule. A ruling against re-

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[4] Contrary to the implications of the Congressional respondents, petitioners never conceded that it was too late for the district court to reassert its jurisdiction and rule on their gerrymander claim in December of 1983. Cong. Opp. at 8. This was a factual error in the district court's June 19, 1984, Memorandum Opinion which is not borne out in any transcript and which petitioners corrected in their emergency petition to the Ninth Circuit. Emergency Petition for Writ of Mandate, filed June 23, 1984, at p. 23, n.2.

[5] Assembly respondents wrongly suggest that petitioners' reference to *Ryan*, *supra*, is distorted. Assem. Opp. at 11. While the court of appeals did state that "only a three-judge panel could make [a] determination" on the question of abstention in a redistricting case, 661 F.2d at 1135, the court nonetheless concluded that *Pullman*-type abstention was inapplicable because no state grounds existed in the case. *Id.* at 1136. Petitioners correctly noted that once the motion for leave to file the second amended complaint in this case was granted, a state court could no longer render the federal claims moot. Cert. Pet. at 15.

spondents from the Los Angeles Superior Court on the abandoned state law issues would undoubteldy be appealed since no party has stipulated away that right. Equal exercise of voting rights should not depend on speculation that the California Court of Appeal and Supreme Court will expedite their process, Cong. Opp. at 27, especially after the California Supreme Court has once declined to do so. Furthermore, the state law issues are not dispositive of the partisan gerrymandering claim, and a decision on those issues will not obviate the federal issue of whether a partisan gerrymander is constitutional. *See* dissent of Judge Schnacke, Cert. Pet. at 18a.

V. THERE IS NO BASIS FOR RESPONDENTS' ATTACK ON PETITIONERS' GOOD FAITH

There is no foundation for respondents' repeated assertion that petitioners have acted in bad faith and have not sought a speedy resolution of the state law issues in this case.[6] As we have seen, it was the Congressional respondents who told the Ninth Circuit that the California Supreme Court would give the petitioners a rapid and authoritative adjudication of the state law issues. The petitioners sought such relief but were denied.

It is not petitioners who have reason to delay the litigation. Petitioners seek to change the status quo; re-

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[6] Congressional respondents wrongly assert that there is clear authority for the proposition that the federal court plaintiffs have a unilateral duty to prosecute a state court action once abstention is ordered. Cong. Opp. at 20, 21. In *Warren* v. *Government National Mortgage Ass'n*, 443 F.2d 624 (8th Cir. 1971), a district court abstained in a foreclosure action, and was affirmed on appeal, because plaintiff had agreed at the pre-trial conference to file a state court action which admittedly provided appropriate remedies. The court of appeals' directions to the plaintiff in *dicta* have been taken out of context by respondents. Neither this case, nor *dicta* in the others cited by respondents, creates a "rule of law" that plaintiffs have a burden of going forward in state court. In any event, petitioners did go forward—to the California Supreme Court—and were turned away.

spondents want to preserve it. Petitioners gain nothing by delay, and have sought to avoid it. Petitioners sought the speediest state court remedy available to them—an original writ in the California Supreme Court—and relief was denied. As Judge Schnacke wrote in his dissent from the district court's decision to continue to abstain, this "is sufficient to overcome any comity consideration and justifies the reassertion of federal jurisdiction." Cert. Pet. at 19a.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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